

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

JOAQUIN LASSALLE-VELAZQUEZ,

Petitioner,

V.

UNITED STATES OF AMERICA,

## Respondent.

Civil No. 12-1795 (JAF)

(Criminal No. 08-037)

## **OPINION AND ORDER**

7 Petitioner, Joaquin Lassalle-Velázquez, brings this pro-se petition under 28 U.S.C.  
8 § 2255 for relief from sentencing by a federal court, alleging that the sentence imposed  
9 violated his rights under federal law. He requests an order to vacate, set aside, or correct  
10 the sentence imposed in Cr. No. 08-037. (Docket No. 1.)

I.

## **Background**

13 On January 30, 2008, the grand jury rendered a two-count indictment against  
14 Joaquin Lassalle-Velázquez and six co-defendants. (Crim. Docket No. 28.) Count One  
15 charged defendants with conspiracy to possess with intent to distribute five kilograms or  
16 more of a mixture or substance containing a detectable amount of cocaine in violation of  
17 21 U.S.C. §§841 and 846. (*Id.*) Count Two charged them with a conspiracy to import  
18 into the United States five kilograms or more of a mixture or substance containing a  
19 detectable amount of cocaine in violation of 21 U.S.C. §§952, 960, and 963. (*Id.*) On  
20 September 14, 2009, Lassalle-Velázquez pled guilty to the Indictment under a straight  
21 plea. (Docket No. 293.) On January 26, 2010, we sentenced Lassalle-Velázquez to three

1 hundred twenty-eight months for each count, to be served consecutively. (Crim. Docket  
2 No. 383.) Lassalle-Velázquez appealed and, on January 26, 2011, the First Circuit Court  
3 of Appeals affirmed his conviction. United States v. Lassalle-Velázquez, Appeal No. 10-  
4 1259 (1st Cir. Jan. 26, 2011). Lassalle-Velázquez filed a pro-se writ of certiorari which  
5 was denied on October 3, 2011. United States v. Lassalle-Velázquez, --- U.S. ---, 132  
6 S.Ct. 172 (2011). On September 25, 2012, he filed this petition, alleging various types of  
7 ineffective assistance of counsel. (Docket No. 1.) The government opposed. (Docket  
8 No. 5.) Lassalle-Velázquez replied. (Docket No. 6.)

9 **II.**

10 **Legal Standard**

11 A federal district court has jurisdiction to entertain a § 2255 petition when the  
12 petitioner is in custody under the sentence of a federal court. See 28 U.S.C. § 2255. A  
13 federal prisoner may challenge his sentence on the ground that, *inter alia*, it “was imposed  
14 in violation of the Constitution or laws of the United States.” Id. A petitioner cannot be  
15 granted relief on a claim that has not been raised at trial or direct appeal, unless he can  
16 demonstrate both cause and actual prejudice for his procedural default. See United States  
17 v. Frady, 456 U.S. 152, 167 (1982). Indeed, “[p]ostconviction relief on collateral review  
18 is an extraordinary remedy, available only on a sufficient showing of fundamental  
19 unfairness.” Singleton v. United States, 26 F.3d 233, 236 (1st Cir. 1994). Claims of  
20 ineffective assistance of counsel, however, are exceptions to this rule. See Massaro v.  
21 United States, 538 U.S. 500, 123 (2003) (holding that failure to raise ineffective  
22 assistance of counsel claim on direct appeal does not bar subsequent § 2255 review).

III.

## Discussion

Because Lassalle-Velázquez appears pro se, we construe his pleadings more favorably than we would those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). Nevertheless, Lassalle-Velázquez's pro-se status does not excuse him from complying with procedural and substantive law. Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997).

8 Lassalle-Velázquez alleges several species of ineffective assistance of counsel. To  
9 prevail on an ineffective assistance of counsel claim, movant must show (1) that his  
10 counsel's performance fell below an objective standard of reasonableness, and (2) that  
11 there is a reasonable probability that, but for his counsel's errors, the result of the  
12 proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687,  
13 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs of the Strickland test must be met  
14 to demonstrate ineffective assistance. Id.

A. Counsel was not ineffective for failing to file a motion to withdraw the Defendant's guilty plea and by failing to reconstruct the record of the "in-chambers plea discussions"

18 Lassalle-Velázquez alleges that we improperly participated in the plea  
19 negotiations in violation of Rule 11(c)(1) of the Federal Rules of Criminal  
20 Procedure. (Docket No. 1.) To support this allegation, Lassalle-Velázquez included with  
21 his motion an affidavit and the affidavits of two co-defendants, Orlando Carrero-  
22 Hernández and Jacobo Peguero-Carela, to establish evidence of our alleged improper  
23 participation. (Docket No. 1.) Lassalle-Velázquez further alleges that counsel failed to  
24 reconstruct a record of the “in-chambers plea discussions” pursuant to Rule 10 (c) of the  
25 Federal Rules of Appellate Procedure.  
26

1       These issues were raised and considered on appeal. United States v. Lassalle-  
2 Velázquez, Appeal No. 10-1259 (1st Cir. 2011). On appeal, the First Circuit explained  
3 that Lassalle-Velázquez did not properly create a record pursuant to Rule 10(c), but that  
4 no such record was required to resolve the claim of improper judicial participation. Id.  
5 The First Circuit held that even if our conduct at the status conference was clearly or  
6 obviously erroneous, Lassalle-Velázquez did not show that absent such an error he would  
7 have gone to trial in lieu of entering a guilty plea. Id. Furthermore, the First Circuit  
8 noted that the record indicated that he never intended to go to trial. Id. In sum, the First  
9 Circuit held that if the error had occurred, Lassalle-Velázquez could not show that it  
10 seriously affected the fairness of the proceedings. Id.

11       The First Circuit has held that when an issue has been disposed of on direct  
12 appeal, it will not be reviewed again through a § 2255 motion. Singleton v. United  
13 States, 26 F.3d 233, 240 (1st Cir. 1994) (citing Dirring v. United States, 370 F.2d 862,  
14 863 (1<sup>st</sup> Cir. 1967)). The Supreme Court has held that if a claim “was raised and rejected  
15 on direct review, the habeas court will not readjudicate it absent countervailing equitable  
16 considerations.” Withrow v. Williams, 507 U.S. 680, 721 (1993). Given the First  
17 Circuit’s decision in Lassalle-Velázquez’s appeal that the fairness of the proceedings  
18 would not have been affected, these issues do not warrant further consideration.

19 **B. Counsel was not ineffective for failing to properly advise petitioner of the**  
20 **effects of pleading guilty**

21       Lassalle-Velázquez alleges that counsel failed to properly advise him of the effects  
22 of pleading guilty. It is well established that a defendant’s “declarations in open court  
23 carry a strong presumption of verity.” Blackledge v. Allison, 431 U.S. 63, 74 (1977).  
24 Here, the record indicates that Lassalle-Velázquez affirmatively answered in court that he

1 had ample time to discuss the case and his decision to plead with his lawyer. (Crim.  
2 Docket No. 429 at 5.) The record also shows that Lassalle-Velázquez affirmatively  
3 answered that he was satisfied with counsel's work. (Crim. Docket No. 429 at 5.) It is  
4 clear from the record that counsel was not ineffective during the plea negotiation  
5 process.

6 Lassalle-Velázquez also alleges that although counsel provided him advice as to  
7 the plea agreement, he did not show Lassalle-Velázquez the agreement. Counsel cannot  
8 perform ineffectively by failing to show his or her client a copy of the plea agreement.  
9 The law requires that defense counsel communicate offers to his client. Missouri v. Frye,  
10 132 S.Ct. 1399, 1408 (2012). Where a plea bargain has been offered, "a defendant has  
11 the right to effective assistance of counsel in considering whether to accept it." Lafler v.  
12 Cooper, 132 S.Ct. 1376, 1387 (2012). Ineffective assistance of counsel does not hinge on  
13 whether counsel gave his or her client a copy of the plea agreement; rather, the question  
14 is whether an offer was communicated and whether counsel was effective in advising the  
15 client to accept or reject an offer. Accordingly, counsel was not ineffective by failing to  
16 show Lassalle-Velázquez the plea agreement.

17 C. **Counsel was not ineffective for failing to request that we recuse ourselves**  
18 **from the case**

19  
20 Lassalle-Velázquez claims that counsel was ineffective for failing to request that  
21 we recuse ourselves because of an alleged conflict of interest made manifest in  
22 "prejudicial, antagonistic, and ridiculing outbursts during the course of sentencing."  
23 (Docket No. 1 at 9.) The First Circuit has held that "[r]ecusal is only required by a state  
24 of mind 'so resistant to fair and dispassionate inquiry as to cause a party, the public, or a  
25 reviewing court to have reasonable grounds to question the neutral and objective

1 character of a judge's rulings or findings.'" In re Lupron Marketing and Sales Practices  
2 Litigation, 677 F.3d 21, 36 (1st Cir. 2012) (quoting In re United States, 158 F.3d 26, 34  
3 (1st Cir.1998)). In considering whether a judge's allegedly improper comments  
4 jeopardized a defendant's rights, it is necessary to consider the comments "in the context  
5 of the trial as a whole...." United States v. Polito, 856 F. 2d 414, 419 (1988). In his  
6 filing, Lassalle-Velázquez does not point to any specific instance or to any specific  
7 comments. Even still, a review of the record of the trial as a whole does not show any  
8 comments we made would have jeopardized Lassalle-Velázquez's rights, nor does the  
9 record reveal any instance that would cast doubt on the neutral and objective character of  
10 the proceedings.

11 D. **Counsel was not ineffective for failing to raise the issue of petitioner's**  
12 **criminal point history assessment at sentencing**

13 Finally, Lassalle-Velázquez claims that his counsel was ineffective because  
14 counsel did not object to the assessment of criminal history points at sentencing.  
15 Lassalle-Velázquez argues that his counsel was ineffective for failing to object at  
16 sentencing to the calculation of his criminal history points. However, U.S.S.G.  
17 § 4A1.1(c) provides that a defendant is assessed "one (1) point ... for each prior sentence  
18 not counted under (a) or (b), up to a total of four points for this item." See § 4A1.1(c) of  
19 the United States Sentencing Guidelines. The presentence report reflects that Lassalle-  
20 Velázquez violated Article 208 of the Penal Code of Puerto Rico, causing aggravated  
21 damage to property—a felony under the Puerto Rico Penal Code. (Docket No. 367 at  
22 15.) Thus, the one-point assessment on Lassalle-Velázquez's criminal history score was  
23 correct and objecting to the assessment would have been meritless. Failing to raise this  
24 meritless argument does not constitute ineffective assistance of counsel. See Vieux v.

1      Pepe, 184 F.3d 59, 64 (1st Cir.1999) (counsel's decision not to pursue "futile tactics" is  
2      not considered deficient performance); see also Acha v. United States, 910 F.2d 28, 32  
3      (1st Cir.1990) (stating that failure to raise meritless claims is not ineffective assistance of  
4      counsel).

5                          **IV.**

6                          **Certificate of Appealability**

7  
8      In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever  
9      issuing a denial of § 2255 relief we must concurrently determine whether to issue a  
10     certificate of appealability ("COA"). We grant a COA only upon "a substantial showing  
11     of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing,  
12     "[t]he petitioner must demonstrate that reasonable jurists would find the district court's  
13     assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537  
14     U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While  
15     Lassalle-Velázquez has not yet requested a COA, we see no way in which a reasonable  
16     jurist could find our assessment of his constitutional claims debatable or wrong.  
17     Lassalle-Velázquez may request a COA directly from the First Circuit, pursuant to Rule  
18     of Appellate Procedure 22.

19        In this respect, we state that it has become common practice to collaterally  
20     challenge federal convictions in federal court by raising arguments of dubious merit.  
21     This practice is overburdening federal district courts to the point of having some of these  
22     criminal cases re-litigated on § 2255 grounds. We look at this matter with respect to the  
23     rights of litigants, but also must protect the integrity of the system against meritless  
24     allegations. See Davis v. U.S., 417 U.S. 333, 346 (1974) (in a motion to vacate judgment  
25     under §2255, the claimed error of law must be a fundamental defect which inherently

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1 results in a complete miscarriage of justice); see also Dirring v. U.S., 370 F.2d 862 (1st  
2 Cir. 1967) (§ 2255 is a remedy available when some basic fundamental right is denied—  
3 not as vehicle for routine review for defendant who is dissatisfied with his sentence).

4 **V.**

5 **Conclusion**

6 For the foregoing reasons, we hereby **DENY** Petitioner's § 2255 motion (Docket  
7 No. 1). Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary  
8 dismissal is in order because it plainly appears from the record that Petitioner is not  
9 entitled to § 2255 relief from this court.

10 **IT IS SO ORDERED.**

11 San Juan, Puerto Rico, this 7th day of June, 2013.

12 S/José Antonio Fusté  
13 JOSE ANTONIO FUSTE  
14 U. S. DISTRICT JUDGE